

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

KENNETH WAGGONER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2006-D-3217 Seth Norman, Judge

No. M2008-01272-CCA-R3-PC - Filed June 12, 2009

The pro se petitioner, Kenneth Waggoner, appeals as of right the Davidson County Criminal Court's summary dismissal of his petition for post-conviction relief from his guilty plea to possession for resale of .5 grams or more of cocaine, a Class B felony, and resulting sentence of ten years in the custody of the Department of Correction. The petitioner alleges that his guilty plea was involuntary due to the ineffective assistance of counsel. The post-conviction court summarily dismissed the petition without the appointment of counsel based upon its finding that the petitioner failed to present claims which would entitle him to post-conviction relief. On appeal, the petitioner argues that he is entitled to post-conviction relief. The State concedes that the petition states a claim for relief and urges this court to remand the case for appointment of counsel and an evidentiary hearing. Following our review, we agree with the State. Accordingly, we reverse the judgment of the post-conviction court summarily dismissing the petition for post-conviction relief and remand the case to the post-conviction court for the appointment of counsel and an evidentiary hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed; Case Remanded.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Kenneth Waggoner, Tiptonville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Sophia S. Lee, Assistant Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the petitioner pled guilty on May 24, 2007, to one count of possession with intent to sell .5 grams or more of cocaine. Pursuant to the agreement, the trial court sentenced the petitioner to ten years in the custody of the Department of Correction. On March 31, 2008, the pro se petitioner filed a timely petition for post-conviction relief alleging that trial counsel was

ineffective in failing to meet with him adequately, failing to interview witnesses, and failing to seek suppression on Fourth Amendment grounds of his statements to police and evidence seized by the police. The petitioner alleged that his guilty plea was involuntary as a result of the ineffective assistance of counsel.

On May 16, 2008, the post-conviction court entered an order dismissing the pro se petition without the appointment of counsel or an evidentiary hearing. The court found that the petitioner's allegation regarding trial counsel's failure to interview witnesses was "tenuous at best" due to the petitioner's failure to list the names of the alleged witnesses in the petition. The court further found that the petitioner pled guilty to a lesser offense to his originally indicted charge of possession of more than 300 grams of cocaine, avoiding a possible sentence of 25- 60 years, and "apparently felt as though [the petitioner] was receiving a reasonable plea offer and accepted it." Regarding trial counsel's investigation of possible defenses and explanation of the effects of the petitioner's prior convictions on sentencing, the court commented that "it is uncertain as to how any effective defenses could have been raised which might have been of any assistance in the case" and "surmise[d] that the petitioner's claim [regarding prior convictions] is based upon his consecutive sentencing." Based upon this analysis, the court found that the petitioner failed to state a claim for relief and dismissed the petition.

ANALYSIS

The decision of a post-conviction court to summarily dismiss a petition for post-conviction relief for failure to state a colorable claim is reviewed as a matter of law. See Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002). Therefore, our review of the post-conviction court's dismissal is de novo. See id.; Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001).

Tennessee Code Annotated section 40-30-106(d) states that a petition for post-conviction relief must specify grounds for relief and set forth facts to establish a colorable claim. "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). When the facts of a petition, taken as true, would not entitle a petitioner to relief, then the post-conviction court may dismiss the petition without the appointment of counsel or an evidentiary hearing. Tenn. Code Ann. § 40-30-106(f).

In the light most favorable to the petitioner, the petition alleges several instances of ineffective assistance of counsel that, if taken as true, would render his guilty plea involuntary. We also note that the findings of the post-conviction court fail to address properly whether the petition presented a colorable claim and instead, address the merits of the petition substantively without the assistance of the appointment of counsel or affording the petitioner an evidentiary hearing. Therefore, we conclude that these allegations establish a colorable claim for relief that entitle the petitioner to the appointment of counsel and an evidentiary hearing.

Based upon the foregoing and the record as a whole, the judgment of the post-conviction court is reversed and the case is remanded for further proceedings consistent with this opinion.

D. KELLY THOMAS, JR., JUDGE